Supreme Court, U. S.
FILED
FEB 28 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1062

MAXWELL DARKS and MARVIN OLIVO,
Petitioners,

v.

TRANSOK PIPE LINE COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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OPINIONS BELOW

The Opinions and Orders of the United States District Court in this case are not reported and are reprinted in Petitioners Appendix B. The Opinion of the Court of Appeals for the Tenth Circuit and Order denying Rehearings are unreported and are included in the Petition as Appendix B-81 through B-94.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Is the opinion of the Court of Appeals affirming the Order of the District Court in an award of condemnation damages correct?

2. Did the Court of Appeals correctly construe and apply this Court's decision in *United Mine Workers v. Gibbs*, 383 U.S. 715?

3. Did the lower Court have jurisdiction over subject matter and persons involved in the litigation?

4. Did the District Court err in its conduct of the condemnation proceedings and *assuming arguendo* that the Court did err does such error constitute a violation of due process and equal protection of the laws guaranteed by the United States Constitution?

STATUTES INVOLVED

31 Stat. 1084, 25 U.S.C. §357

§357 Condemnation of lands under laws of States

Lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee.

Title 52 Oklahoma Statutes §36.5

Any natural gas public utility having first obtained a certificate from the Commission as hereinbefore provided, desiring to exercise the right of eminent domain for the purpose of acquiring property for the underground storage of natural gas shall do so in the manner hereinafter provided. Such natural gas public utility shall present to the District Court of the country where the land is situated, or to the judge thereof, a petition setting forth the purpose for which said property is sought to be acquired, a description of the property sought to be appropriated and the names of the owners thereof as shown by the records of such county. The petitioner shall file the certificate of the Commission as part of its petition and no order by the Court granting said petition shall be entered without such certificate being filed therewith. The Court or the judge thereof shall examine said petition and determine whether the petitioner has the power of eminent domain and whether said property is necessary to its lawful purposes, and if found in the affirmative, such findings shall be entered in the record and subsequent proceedings shall follow the procedure now provided by law in the exercise of the rights of eminent domain by railroads.

STATEMENT

This case deals with the condemnation of specific property in Hughes County, Oklahoma for use as a natural gas storage facility. The land and mineral interests which were to be condemned were held by the United States for the use and benefit of certain restricted Indians. Within the land held for the use and benefit of the Indians, two non-Indians held land interests which were included in the same condemnation proceedings. The Respondent has chosen to

restate the operable facts in order to avoid the Petitioners penchant for distortion and combining fact and argument. (Pet. pp. 10-25)

The Transok Pipe Line Company is a wholly owned subsidiary of the Public Service Company of Oklahoma. It is engaged in the business of transporting and distributing natural gas by means of pipelines *within* the State of Oklahoma for ultimate public use.[1] (See Pet. App. B-7), and qualifies as a natural gas public utility as defined in the Oklahoma Statutes (See Pet. App. C-3). In January 1972, the Transok Pipe Line pursuant to the Oklahoma Statutes filed an application with the Corporation Commission of the State of Oklahoma for a certificate declaring that the Channel Booch Formation underlying certain specified tracts of land in Hughes County was suitable for underground storage of gas. After extensive hearings at which testimony and evidence were offered, the Corporation Commission issued its findings and order declaring that the applicant possessed the power of eminent domain and that the property was suitable for storage of gas and stating "That this Order should be and is hereby declared to be the Certificate required by 52 O.S. 1961 Sec. 36.4, as a condition precedent to the filings of the application or petition of Transok Pipe Line Company in the Courts of the State of Oklahoma.[2] Subsequently on or about June 25, 1973 Transok Pipe Line Company filed an action seeking condemnation of an "easement" for the preparation, the operation and use of certain

[1] Petitioners argued below and argue in this Court the requirement of an FPC Certificate of Convenience and Necessity (Petition p. 11). Yet there is and was no evidence showing Transok to be engaged in interstate activity. Even if it were so engaged, the condemnation procedure of Oklahoma would still apply to the Oklahoma land.

[2] Contrary to Petitioners' representation at page 11, the Commission found 2BCF of gas remaining in the reservoir (Pet. App. C-4).

tracts as a gas storage facility in the Channel Booch Formation. Joined in the proceeding were the United States and specific individuals for whose use and benefit the United States presently holds title to the surface land and mineral rights. All of the individuals with the exception of Darks and Olivo were restricted Indians, heirs of the original Indian Allottees, members of the Five Civilized Tribes. The action was filed in the Federal District Court pursuant to 25 U.S.C. §357, which authorizes the condemnation of lands allotted in severalty to Indians in the same manner as lands owned in fee. Darks and Olivo, although not themselves Indians, were joined in the federal court proceeding because of the nature of their interest in land sought to be condemned. Darks was the owner of a one-half surface interest in 80 acres in tract 1 and the entire surface interest of tract 2. Olivo was the owner of a surface interest in 160 acres of tract 6. The mineral rights in tracts 1, 2, and 6 were owned by Indians.

The Indian defendants in the proceeding were represented by the United States Attorney for the Eastern District of Oklahoma and the defendants Darks and Olivo were represented by private counsel. As provided by law, the District Court appointed Commissioners to determine the value of the condemned property. (Pet. App. B-1, B-12). The Report was completed on October 1, 1973 and Transok, as required by law, paid into the court the total compensation found by the Commissioners on the day the report was filed. All of the defendants objected to the report and demanded a jury trial on the matter of damages.[3] A hearing *de novo* was scheduled.

[3] It should be noted that Darks exercised fully his due process rights filing numerous motions and presenting arguments to the court on various facets of the case. In each and every instance Darks' objections were heard and passed upon by the court. In a nutshell the Petitioners are dissatisfied with the amount of the award.

On August 22, 1975, Transok and the United States, Guardian and the owner of legal title to certain tracts of land for the use and benefit of the named Indians entered a stipulation for judgment. Judgment was entered and the agreed upon amounts of compensation were distributed to the individual defendants. Among the Indians who agreed and accepted the money was Agnes Lucas (now Wesley) who has filed a brief in support of the petition herein.[4]

ARGUMENT

The Petitioners in this case have presented no compelling reasons why this Court should or needs to review the decisionof the Tenth Circuit Court of Appeals. Nowhere in the Petition filed by Darks and Olivo and in the supporting brief of Wesley is the decision of the appellate court expressly challenged. Rather the Petition is for the most part devoted to a restatement of alleged abuses of discretion by the lower court. There is no constitutional question presented for review; there is no conflict with prior Court decisions or the decision of another circuit court; there is no novel interpretation of a federal statute. Despite Petitioners' arguments, the parties in the proceeding were afforded every opportunity to be heard and to present testimony and evidence.

The facts presented in this case do not have broad application and the case by its very nature is limited to the peculiar and particular facts.

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[4] Lucas and three other restricted Indians attempted to set aside the judgment alleging they did not understand the stipulation. However, the Court rejected this contention on August 23, 1976 when it was demonstrated that these defendants had received and accepted the check paid them.

THE DECISION BELOW IS CLEARLY CORRECT

There is no error in the decision of the Tenth Circuit Court of Appeals. In its decision the Court treated carefully each and every issue raised by the petitioners here. The argument of the Petitioners comes down to three contentions (a) that the federal court did not have jurisdiction to hear the case as to non-Indians, (b) the Secretary of the Interior was not made a party to the suit and[5] (c) the District Court abused its discretion in its rulings in the conduct of the case and in its grant of a new trial because of the excessiveness of the jury's award.[6]

The condemnation proceeding was filed in the federal district court pursuant to 25 U.S.C. §357 because the land and mineral interests involved in the gas storage facility were held by the United States for the use and benefit of certain Indians. These Indians were heirs of Allottees, members of the Five Civilized tribes. The land and mineral interests were the subject of restrictions on alienation. Accordingly the federal court and only the federal court could hear the condemnation case as to these particular land and mineral interests. *Town of Okemah v. United States*, 140 F.2d 963 (10th Cir. 1944); See also *McElroy v. Pegg*, 167 F.2d 668 (10th Cir. 1948), *cert. den'd* 333 U.S. 817.

The United States and the named Indian heirs were joined in the proceeding and service upon the United States was made upon the United States Attorney for the Eastern Dis-

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[5] The brief in support of the petition filed by Wesley deals primarily with this point. However, as in the court below, no statutory or case support is offered.

[6] The Petitioners Darks and Olivo contend that the District Court rather than ruling on plaintiff's motion for new trial should have directed *sua sponte* a remittitur.

trict of Oklahoma. Section 357 does not require that the Secretary of the Interior be joined as party, nor does the statute require that the Secretary's approval be obtained to any transfer. The "indispensable party" to any such condemnation proceeding is the United States, not the Secretary of the Interior. *Nicodemus v. Washington Water Power Company*, 264 F.2d 614 (9th Cir. 1954); See also *State of Minnesota v. United States* 305 U.S. 382.[7] There is and cannot be any contention that the United States was not properly joined or that the restricted Indians were inadequately represented.[8]

Darks and Olivo were joined in the federal court proceeding because their interest in the land was commingled with that of the restricted Indians and the plaintiff sought to have all claims and interests in the same tracts adjudicated in a single proceeding. Pendent jurisdiction is a doctrine of discretion, not of plaintiff's right. *Massachusetts Universalist Convention v. Rogers Co.* 183 F.2d 497 (1st Cir. 1950) and its justification lies in the considerations of judicial economy, convenience and fairness to litigants. The plaintiff wherever possible should have his whole case tried at one time. *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 320.

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[7] As the Court of Appeals noted in its decision below "one statement [dicta] in *Oklahoma Gas* is not authority for the proposition that the Secretary is indispensable." (Pet. App. B-85) (parenthetical language supplied.)

[8] Wesley in her petition asserts that the Secretary and the BIA did not approve the settlement of the claims of the restricted Indians. However, no authority is cited to support the proposition that approval is required. Indeed in this case, Wesley agreed to the settlement and accepted the check offered in payment for her interest.

This Court's decision in *United Mineworkers v. Gibbs*, 383 U.S. 715 (1966) establishes the guidelines for the exercise of pendent jurisdiction. The courts below correctly applied these guidelines to determine that Darks and Olivo were properly joined. As *Gibbs, supra*, makes clear in order for pendent jurisdiction to exist the federal claims must have substance sufficient to confer subject matter jurisdiction on the court and the federal and state causes must derive from a common nucleus of operative fact, which if, considered without regard to their federal or state character a plaintiff would ordinarily be expected to try them in one judicial proceeding. Id. at 725. Once having acquired jurisdiction as a consequence of the federal issues, "there is power in the federal courts to hear the whole." Id. at 725.

In the case here presented, the very nature of the petitioners' land interests were so commingled with those of the other defendants, there is no question that the cause of action stems from the same nucleus of operative facts. In such circumstances the *Gibbs* doctrine, as the Court of Appeals pointed out, has been appropriately extended to cases involving state claims against defendants over whom there is no independent basis for federal jurisdictions, citing *Curtis v. Everette*, 489 F.2d 516 (2nd Cir. 1973), *cert. den'd.* 416 U.S. 996; *Almenares v. Wyman*, 453 F.2d 10 (2nd Cir. 1971) *cert. den'd* 405 U.S. 944; *Leather's Best, Inc. v. S.S. Mormaclynx*, 451 F.2d 800 (2nd Cir. 1971).

The settlement of the federal issues i.e. the compensation to the restricted Indian defendants did not moot the assertion of pendent jurisdiction. As this Court has noted "mootness . . . . may not occur until after substantial time and energy have been expended looking toward resolution of a dispute that the plaintiffs were entitled to bring in a federal court." *Rosado v. Wyman*, 397 U.S. 397, 404 (1970). It will be remembered in that case, this Court ruled mootness

as to the federal question did not deprive the federal court of power to hear pendent state claims. See *Hagans v. Lavine*, 405 U.S. 528 (1974).[9] As the court below correctly noted the federal issues which gave the court jurisdiction initially were substantial i.e. exclusive jurisdiction over the subject matter, and substantial time and energy had been expended by all parties. Compare *Galella v. Onassis*, 487 F.2d 986 (2d Cir. 1973). This case has been in litigation since July 1973 as the lower court stated, after four years, countless motions, two jury trials, "it would be a shocking waste of time and money now to require this cause to be relitigated in state court." (Pet. App. B.91).

The lower court did not abuse its discretion in its evidentiary rulings or in its granting of the motion for new trial because of excessiveness of the verdicts. *Holmes v. Wack*, 464 F.2d 86 (10th Cir. 1972); See also *Harris v. Quinones*, 507 F.2d 533 (10th Cir. 1977). To be sure, it is not the purpose of a petition for certiorari to correct individual abuses in the exercise of discretion, as stated in *Magnum Co. v. Coty*, 262 U.S. 159, 163,

> "The jurisdiction [of the Supreme Court to review cases by way of certiorari] was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing. . . ."

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9 *State of Arizona v. Cook Paint & Varnish Co.*, 541 F.2d 226 (9th Cir. 1976), *cert. den'd*, 97 S.Ct. 1327 (1977); *Klaus v. Hi-Shear Corp.*, 528 F.2d 225 (9th Cir. 1975); *Kavit v. A.L. Stamm & Co.*, 491 F.2d 1176 (2d Cir. 1974); *Brunswick v. Regent*, 463 F.2d 1205 (5th Cir. 1972); 3A Moore's Federal Practice, ¶18.07 [1.-3] & n. 41.

THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW

Petitioners Dark and Olivo contend that the entire condemnation procedure in Oklahoma is a violation of due process and equal protection guaranteed by the state and federal constitutions because the condemnor is entitled to possession of the property while the issue of damages is litigated.[10] (Pet. 31-37). Notwithstanding Petitioners' emotional tirade, the Oklahoma statutes providing for and establishing condemnation proceedings do not violate procedural or substantive due process standards.[11] Under Oklahoma law the Transok Pipe Line Company has the power of eminent domain and in the exercise of that power it followed the procedures established by the Oklahoma legislature. The Only issue in this case is and has been the measure of damages. On this matter the petitioners presented their evidence and the jury awarded damages.

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10 Under the state procedures, as in this case, if the land owner is not satisfied with the award, he may seek a jury trial and a *de novo* hearing at which any report by the Commissioners is deemed incompetent. In response to the same accusation, the District Court stated "The Oklahoma condemnation procedure is not unconstitutional but affords due process of law and equal protection of the laws in all respects." (Pet. App. B-20).

11 Petitioners cite several cases allegedly supportive of their position *Fuentes v. Shevin*, 407 U.S. 67, (replevin), *North Georgia Finishing Inc. v. Di-Chem, Inc.* 419 U.S. 601; (garnishment). The Oklahoma condemnation procedure is not a summary proceeding. Condemnation may occur only after there is a hearing to justify the taking and define the property to be taken at which all interested parties are entitled to participate. The next step in the two-step process is the measure of compensation for the taking.

No amount of rhetoric, no amount of bootstrapping can enlarge this case beyond its narrow parameters.[12] There is no substantive federal question presented.

THERE IS NO CONFLICT WITH DECISIONS OF OTHER COURTS

The decisions of the lower courts and the court of appeals are not in conflict with the decision of this Court or any other Circuit. Neither the lower court nor the court of appeals engaged in any novel interpretation of law. Indeed the petitioner has cited no cases or statutes to sustain their position.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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[12] Petitioners contend restrictions on the alienation of Indian lands have been eliminated by the passage of time. (Pet. p. 37) Such restrictions have been imposed by Congress in its plenary exercise of jurisdiction.